[redacted]

October Term, 1955

No. [redacted]142

L. Bamberger & Company, Inc.,
Appellant,

v.

The United States,
Appellee.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

Solomon M. Charles,
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INDEX

IN THE

Supreme Court of the United States

October Term, 1923

No. 485

L. RICHARDSON & COMPANY, INC.
Appellant

vs.

THE UNITED STATES
Appellee

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims sustaining a demurer to a petition for $270,743.00 damages on account of the government's refusal

to take a balance of a large quantity of wool "finer than 56's" which it had agreed to purchase from the plaintiff and part of which the government accepted and paid for.

On December 15, 1917 and for some years thereafter the War Trade Board, the War Industries Board and the Wool Administrator were agents of the War Department and the President and as such the War Trade Board issued a regulation Exhibit "A" (p. 4) which required an import license for all wool to be imported and a written option to the government for purchase of some goods for ten days after customhouse entry and required an agreement that the importer could not sell the wool without the consent of the War Trade Board.

The War Trade Board on January 8, 1918 issued another regulation Exhibit "B" (p. 5) superseding Exhibit "A," effective January 14, 1918 which prohibited the transfer of ownership or control by an importer of any wool to any person outside of the United States without the consent of the War Trade Board or sell to any person in the United States without such consent and such person also signing a similar agreement; the consent to be obtained by applying to Textile Alliance Inc., a government agency, as alleged.

On March 11, 1918, the acting Quartermaster General issued a regulation, Exhibit "C" (p. 7), which was an exercise of certain options leaving others intact and while it used the word intention the next Exhibit "D" indicated the government construed Exhibit "C" as an exercise and not just an intention to exercise the option.

The acting Quartermaster General on April 1, (sometimes referred to as April 2nd) issued another regulation Exhibit "D" (p. 7) which reserved the

right to exercise the options on wool "finer than 56's" bought after April 1, 1918 and required a report each Saturday by the importer of all purchases made by him and failure to so report might forfiet the importer's rights.

On May 17, 1918, the acting Quartermaster General issued another regulation (p. 8) which exercised the option on the wool in issue, which is wool "finer than 56's" and was bought *after* (not prior to) April 1, 1918, but before July 12, 1918.

That between April 1, 1918 and July 12, 1918 the plaintiff purchased a large quantity of wool "finer than 56's" on which the government was given an option and which the government afterwards agreed to buy, accept and pay for and the government did accept and pay for all except 7,168 bales and 1,518 bags and this the plaintiff was forced to sell on the market, having obtained by the best efforts, a price $270,746.00 less than the government contract price.

The government having exercised its option and agreed to purchase plaintiff's wool the War Trade Board on July 12, 1918 issued a regulation Exhibit "F" (p. 8) taking over and cancelling the licenses theretofore issued to the plaintiff and issuing ones in the name of the Quartermaster General and required that the wool be consigned to the government agency, the Textile Alliance Inc., with the bill of lading running to it and assigned to the Quartermaster General and thus the wool was shipped direct to the Quartermaster General.

When the plaintiff was seeking to charter a boat

to ship the wool to the Quartermaster General he was required to give guarantee in writing that the vessel would carry nothing but the wool destined to the Quartermaster General and some ballast,

Exhibit "G-1" (p. 11) dated July 24, 1918 a regulation of the Quartermaster General is set out to show that the government officially construed Exhibit "D" as an exercise of the options and not just an *intention to exercise* and that the same construction is applicable to Exhibit "E," as he stated that in Exhibit "D" "he agreed he would instruct, and did instruct" the wool administrator to exercise certain options, and that this was done to encourage importation of wool.

It is alleged that the government agreed to buy the wool and it accepted part and it is then alleged that the government later confirmed this agreement by the letter of the Assistant Wool Administrator Exhibit "H" (p. 12) of December 23, 1918 it being alleged that part of the wool named in the letter is the wool in issue (p. 3, Par. 8A).

It is further alleged that the plaintiff duly complied with all regulations, with all the terms and conditions of its agreement, and sold the wool to the very best advantage for the government's benefit.

ASSIGNMENT OF ERRORS

THE COURT ERRED IN HOLDING:

1. THAT THE PLAINTIFF WAS NOT ENTITLED TO RECOVER UNDER THE REGULATIONS.

2. That the regulations did not make a binding contract.

3. That the allegations did not constitute an agreement to purchase by the government and part performance thereof did not make the government liable for its failure to comply with the agreement.

4. In holding that the different acts of the government as alleged did not of themselves constitute an exercise of the options.

5. In holding that the letter of Assistant Wool Administrator Barnard (p. 12) Exhibit "H" of December 12, 1918, did not constitute, with the other allegations, a contract compelling the government to take the wool in issue.

6. In holding that the regulations set out were not obligatory and did not amount to a taking of the plaintiff's wool for the use and benefit of the government for a period of time.

7. That the demurrer should be sustained.

THE ARGUMENT

1 and 2. The regulations of the Quartermaster General set out with the petition are ones under which a cause of action and agreement can arise under Section 145 of the Judicial Code giving the Court of Claims jurisdiction founded on regulations of an executive department.

The regulations set out are regulations coming within the purview of Section 145 of Judicial Code; they come exactly within that Section under Maddox vs. U. S. 20 Ct. Cls. 193, where regulation (p. 194) No. 74 was issued by the Adjutant General's Office while here it was by the Quartermaster General.

In Gulf Transit Company vs. U. S. 43 Ct. Cls. 183, the Regulations (p. 185-6-7) were issued by the Navy Yard Commandant at Pensacola, Fla., and at page 195 Chief Justice Peelle for the Court says:

> "The Navy Yard came under the control of the Secretary of the Navy and whatever orders, rules or regulations are issued by the commandant thereof are presumed to be with the approval of the Secretary of the Navy, and if such orders, rules or regulations be not in conflict with Acts of Congress they have the force of law." (U. S. vs Symonds 120 U. S. 47, 49; U. S. vs. Eaton 144 U. S. 677, 688.)

This case held that where a vessel was docked *under regulations* forming a contract for a stipulated consideration, it was a case of contract within the statute; and the want of ordinary care on the part of the agents of the government was a breach of the contract and a cause of action within the juridiction of the Court of Claims.

Clearly regulations issued by the Quartermaster General are regulations of the War Department. See also Landram vs. U. S., 16 Ct. Cls. 74-86.

These regulations required the plaintiff to enter

into an agreement with the government giving it an option, and as amended prohibited the plaintiff from transferring the title, or even control, of the wool to anyone out of the United States and prohibited it from selling any of the wool to anyone within the United States without the government's consent and then requiring the purchaser to sign similar agreements.

In fact the plaintiff could not do one thing with the wool it had purchased without permission from the government, these regulations clearly show this under any construction, certainly under liberal construction in favor of the plaintiff.

A government contract is construed most strictly against the government and in favor of the contractor where the government prepares the contract (U. S. vs. NNSB & DD Co. 178 Fed. 194, C. C. A.) for the reason that it chooses its own words and has no right to induce another to contract with it on its own words on the supposition that its words mean one thing while it hopes that the Court will adopt a construction by which they will mean another thing more to the Government's advantage. Phoenix Insurance Co. vs. Slaugher, 12 Wall. 404, 20 L. Ed. 444; Noonan vs. Bradley, 9 Wall. 394, 19 L. Ed. 757; Bijur Motor Lightning Co. vs. Eclipse Mach Co., 237 Fed. 89; Caldwell vs. Twin Falls Salmon River Land etc. Co., 225 Fed. 584; Christian vs. First National Bank, 155 Fed. 705, 84 CCA 23; Wilson vs. Cooper, 95 Fed. 625; Turner vs. Meridian Fire Ins. Co., 16 Fed. 454; The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Pacific Hardware etc. Co. vs. U. S., 48 Ct. Cls, 399; Edgar etc. Fdy. etc. Works vs. U. S., 34 Ct. Cl. 205; Otis vs. U. S., 20 Ct. Cl. 315; Gentz vs. Dist. of Col., 18 Ct. Cl. 569.

3. WHERE IT IS ALLEGED THAT THE OPTIONS WERE GIVEN UNDER THE REGULATIONS, REQUIRING SAME AS A CONDITION PRECEDENT TO THE ISSUANCE OF A LICENSE, AND THE LICENSE WAS ISSUED AND A REGULATION THEN ISSUED DIRECTING AN EXERCISE OF THE OPTION BY THE GOVERNMENT OFFICERS, AND THEN THE LICENSE WAS WITHDRAWN, CANCELLED AND A NEW LICENSE WAS ISSUED IN THE NAME OF THE QUARTERMASTER GENERAL, DELIVERED TO THE PLAINTIFF, AND THE BILL OF LADING WAS MADE OUT TO THE TEXTILE ALLIANCE INC., AND ASSIGNED TO THE QUARTERMASTER GENERAL AND A WRITTEN GUARANTEE TAKEN FROM THE PLAINTIFF THAT NOTHING BUT SUCH WOOL CALLED FOR IN THE LICENSE WOULD BE CARRIED IN THE SHIP CHARTERED BY THE GOVERNMENT TO THE PLAINTIFF, FOLLOWED BY DELIVERY OF PART TO AND PAYMENT THEREFOR BY THE GOVERNMENT, ARE ACTS WHICH OF THEMSELVES IN LAW CONSTITUTE AN AGREEMENT MAKING THE GOVERNMENT LIABLE FOR THE PURCHASE PRICE OF THE REMAINDER OF THE WOOL.

Mr. Justice Holmes in Hobbs vs. Massasoit Whip Co. 158 Mass. 194, 33 N. E. 495, said:

> "Conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of the mind of the parties, a principle sometimes lost sight of in the cases."

It is a rule, too well established to require extended discussion, that a person is bound by the reasonable interpretation of his conduct regardless of any secret intention to the contrary. In other words, if a reasonable interpretation of the acts done and the language used is to create an offer or an agreement the party

will be bound thereby, even though his uncommunicated intention may have been directly to the contrary.

> "The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject."

13 *Corpus Juris*, 265.
Dillon vs. Anderson 43 N. Y. 231, 236.
Phillip vs. Gallant, 62 N. Y. 256.
Smith vs. Hughes, L. R. 6 Q. R. 597, 607.

It is well settled that offers of such nature as set out in the first regulations may be made to the public at large and that anyone of that public who accepts the standing offer by acting upon it may create a binding agreement which he can enforce against the offerer.

Shuey vs. United States (1875) 92 U. S. 73.
Salt Mfg. Co. vs. East Saginaw (1871) 80 C. S. 373:
Calder vs. Hinderson (1893) 54 F. 802.
Seymour vs. Armstrong & Kassenbaum (1901) 62 Kan. 720, 60 Pac. 612.
Bull vs. Talcott (1794) 2 Foot (Conn.) 119.
Walsh vs. St. Louis Exposition (1885) 16 Mo. App.

502 (Affirmed 90 Mo. 459).

Reif vs. Page (1882) 55 Wis. 496.

Patton's Executor vs. Hassinger (1871) 69 Pa. St. 311.

Tarbell vs. Stevens & Co. (1858) 7 Iowa 163.

Arnold vs. Phillips (1846) 1 Ohio 163.

Sears vs. Eastern Railroad Co. (1867) 14 Allen (96 Mass.) 433.

Alvord vs. Smith 63 Ind. 58, 62.

Carlile vs. Carbolic Smoke Ball Co. 1 W. B. 256 (1893).

An implied agreement may arise from the acts and conduct of the parties without any express words or agreement.

> "It may be said broadly that any conduct of one party, from which the other may reasonably draw the inference of a promise is effective in law as such."
>
> *Williston on Contracts, Section 22A.*
>
> See also the case of *Wisconsin Steel Co. vs. Maryland Steel Co.*, C. C. A., 203 Fed. 403, 405.
>
> *Phillip vs. Gallant*, 62 N. Y. 256.
>
> "It will be implied that the party did make such agreements as under the circumstances disclosed he ought in fairness to have made."
>
> 15 Am. & Eng. Enc. of Law, 2nd Ed. 1078.

The Wisconsin Steel Company case, supra, is particularly instructive as showing the readiness of the courts to find an implied contract from the mere acts and conduct of parties, although there are no words importing an obligation. In that case, the court found an implied contract to do certain work on certain spe-

cified terms and conditions, the implication resulting almost entirely from the conditions and surrounding situation which existed at the time the implied contract was made.

In Zitake vs. Grohn, 128 Wis. 159, 107 N. W. 20, it was held, that although to constitute a contract there must have been a meeting of the minds, it is not necessary that they meet, "on express words clearly expressed." There must be words and acts justifying the conclusion that the minds of the parties met and agreed upon the same proposition, but it is not necessary that the words used be always clearly expressed. They may have been ambiguous or uncertain, and yet if it can be determined from the words, viewed in the light of the acts of the parties and the surrounding circumstances that the minds of the parties met, there will be a contract.

In McKell vs. C. & O. Ry Co. 186 Fed. 39 (175 Fed. 321; Certiorari denied 220 U. S. 613) a letter contained the phase: "I think we have about come to the following conclusion," and thereafter was summarized the terms and conditions of an agreement. The Court held that this constituted a valid contract.

In Lane & Niam vs. Warner 53 Tex. Civ. Apps. 122; 115 S. W. 903, the letter to plaintiff which the Court held constituted an acceptance contained the phrase: "I guess it is up to you."

Exhibit "G-1" (p. 11) shows that the Government officials themselves construed Exhibit "D" as an exercise of the option and not just an intention to exercise.

This construction by Government officials is binding on the Court. D. C. vs. Gallagher 124 U. S. 505; 8 Sup. Ct. 585 affirming 19 Ct. Cls. 564, where the Court said:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

In Merriam vs. United States, 2 Sup. Ct. 536, 107 U. S. 441, which is a strong case, the Court said:

> "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the light which the parties possessed when the contract was made. Nash vs. Towne, 5 Wall. 689 (18 L. Ed. 527); Barreda vs. Silsbee, 21 How. 146, 161 (16 L. Ed. 86); Shore vs. Wilson, 9 Cl. & Fin. 355, 555; McDonald vs. Longbottom, 1 El. & El. 977; Munford vs. Gething, 29 L. J. C. P. 110; Carr vs. Monteflore, 5 B. & S. 407; Brawley vs. U. S. 168 (24 L. Ed. 622)."

See Garrison vs. United States 7 Wall. 688.

The construction put on a contract by one of the parties thereto and not disputed by the other party is binding as is held in U. S. vs. NN. S. B. & D. D. Co. 178 Fed. 194 (C. C. A.), citing at page 202; C. P. Ry. vs. U. S. 28 Ct. Cl. 427; U. S. vs. Corliss, 91 U. S. 322; Smoots case, 15 Wall. 47; U. S. vs. McDaniel, 7

Pet. 14. In the case of Central Pacific Railway Company vs. United States, 28 Ct. Cl. 427, in referring to this question, it is said:

> "A construction given to a contract by the express declaration of one party, and the silent acquiescence of the other prior to or during the service of the performance, cannot be repudiated after the party has acted upon the faith of it."

4. WHERE THE GOVERNMENT HAS ISSUED A LICENSE TO IMPORT WOOL WITH AN OPTION FOR THE GOVERNMENT TO PURCHASE AND THE GOVERNMENT WITHDRAWS AND CANCELS THE LICENSE AND ISSUES A NEW ONE IN THE NAME OF THE QUARTERMASTER GENERAL AND DELIVERS IT AND RECEIVES FROM THE PLAINTIFF A BILL OF LADING MADE OUT TO THE TEXTILE ALLIANCE, INC. AND ASSIGNED TO THE QUARTERMASTER GENERAL AND THE GOVERNMENT RECEIVES A WRITTEN GUARANTEE THAT NOTHING BUT THE WOOL DESCRIBED IN THE LICENSE WOULD BE CARRIED IN THE SHIP CHARTERED TO THE PLAINTIFF BY THE GOVERNMENT FOLLOWED BY PAYMENT FOR PART OF THE WOOL, SUCH ACTS OF THEMSELVES CONSTITUTE AN EXERCISE OF THE OPTION.

Clark on contract (2nd Ed.) page 15, the Handbook Series, states the rule as follows:

> "14. An offer of *its* acceptance may be made by conduct as well as by words" and many cases cited.

The rule is stated almost in the same language in Anson's Law of Contract (Am. Ed.) pages 22, 23. This rule is applicable to options.

Benjamin on Sales p. 845 (6th Ed.) states:

> "The law as to the endorsement and delivery of bills of lading was thus stated by Lord Justice Bowen (Sanders vs. MacLean, 11 Q. B. D. 327 at 341): A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is *universally recognized* as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading wherever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the endorsee to full possession thereof the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowners. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

The endorsement and delivery of the bill of lading to the Quartermaster General under his demand and requirement as alleged constitute an exercise of the option. This is alleged and there is nothing to indicate otherwise.

5. A LETTER OF A DULY AUTHORIZED GOVERNMENT OFFICIAL REFERRING TO PART OF AN ORDER THE OTHER PART HAVING BEEN ACCEPTED AND STATING THAT THE BALANCE HAD BEEN BOUGHT FOR THE GOVERNMENT AND DIRECTING HOW TO HANDLE IT IS A CONTRACT OF PURCHASE REQUIRING THE GOVERNMENT TO TAKE AND PAY FOR SAME WHEN RECEIVED.

In the American Smelting and Refining Company vs. U. S. 42 Sup. Ct. 420;——U. S.—— this court held that an acceptance by letter was a valid legal contract and the claimant could recover under it and the Court said in so holding: "Of course the expressed contemplation of more formal document did not prevent the letters from having the effect thus otherwise they would have had. * * * "

This letter constitutes a good contract under U. S. vs. Purcell Envelope Co., 39 Sup. Ct. 300. 249 U. S. 313; Gibbon vs. U. S. 8 Wall. 269; U. S. vs. Barlow 164 U. S. 123; Grant vs. C. S. 5 Ct. Cls. 71; Ford vs. U. S. 17 Ct. Cls. 69.

6. WHERE THE GOVERNMENT ISSUES A REGULATION FORBIDDING THE SALE OF COMMODITIES AND REQUIRING AN OPTION TO THE GOVERNMENT AS A CONDITION FOR AN IMPORT LICENSE FOLLOWED BY ANOTHER REGULATION EXERCISING THE OPTION AND A FURTHER REGULATION REQUIRING THE LICENSE TO BE CHANGED TO THE QUARTERMASTER GENERAL AND THE BILL OF LADING MADE OUT TO AND ASSIGNED TO THE GOVERNMENT OFFICIALS DONE FOR THE PURPOSE TO ENABLE THE GOVERNMENT TO PROCURE SUFFICIENT WOOL AND GIVING IT CONTROL OF THE WOOL MARKET, SUCH ACTS CONSTITUTE A TAKING WITH AN IMPLIED AGREEMENT TO PAY FOR SAME.

As said by Mr. Justice Holmes in Portsmouth Harbor Land & Hotel Co. vs. United States, 43 Sup. Ct. 135; 242 U. S. 262:

> "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied whether it was thought of or not."

We find in 1 Nichols (2nd ed.) Eminent Domain, 336:

> "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of right or interest capable of being enjoyed as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and intangible, incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds:

> "Intangible property such as choses in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this soverign authority (the power of eminent domain) as fully as land or other tangible property."

This is nearly an exact quotation from Mr. Justice Lurton in Cincinnati vs. Louisville & Nashville Ry. Co., 223 U. S. 390 at 400; 32 Sup Ct., 267.

The government regulation was a temporary "taking" of the wool of the appellant, and it was in viola-

tion of his constitutional right, for when defining constitutional liberty, this Court said in Myer vs. Nebraska, 43 Sup. Ct. at 626; 260 U. S.—:

> "While this Court has not attempted to define with exactness the liberty thus granted. the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happinesss by free men."

And again at 627:

> "The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislative power is not final or conclusive but is subject to supervision by the Courts. Lawton vs. Steele 152 U. S. 133, 137; 14 Sup Ct., 499; 38 L. Ed. 385."

In Terrace vs. Thompson, 44 Sup. Ct. 17 at 18, 262 U. S.—, Mr. Justice Butler said:

> "The Terraces' property rights in the land include the right to use, lease, and dispose of it for lawful purposes (Buchanan vs. Warley, 245 U. S. 60, 74; 38 Sup Ct. 16 L. Ed. 149, L. R. A. 1918C,

210 Ann. Cas. 1918 A, 1201) and the Constitution protects these essential attributes of property (Holden vs. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780) and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truas vs. Raich, supra; Meyer vs. State of Nebraska, 261 U. S.——, 43 Sup. Ct.. 625, 67 L. Ed.—). If, as claimed, the State act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatusuka, and deprive him of his right to pursue the occupation of farmer and the threat to enforce it constitutes a continuing unlawful restricting upon and infringement of the rights of appellant——."

Therefore, the regulations were a "taking" of property in violation of the Constitution for which the Government is liable. Tempel vs. U. S., 39 Sup. Ct. 56 at 59, and cases cited therein; U. S. vs. Gr. Falls Co. 112 U. S. 655; 5 Sup. Ct. 306; U. S. vs. Lynah, 188 U. S. 445; 23 Sup. Ct. 349.

In Roxford Knitting Company vs. Moore, 265 Fed. 177 (Certiorari denied, 40 Sup. Ct. 588) the Court held that "orders" for supplies under the President's proclamation, made such "orders" *obligatory* on any person to whom such "orders" were given, and the Court stated at p. 192:

> "The majority of the Court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded of it, that it had *no right to refuse to comply*, and that with

this understanding, the supplies were furnished. That being so, effect should be given to the intent of Congress that *civil contracts* should be *postponed to orders compulsorily placed.*"

This case was approved and distinguished by this Court in a note to Price and Co. vs. U. S., 43 Sup. Ct. 299, at 301, as was the case of United States vs. Russell, 13 Wall. 623.

"A *requisition, like a taking by eminent domain, is not a taking under agreement. Asquiescence* on the part of a *loyal citizen* to the *taking* of his property by the sovereign is *not* the *equivalent* of the *making* of a *contract,* or the entering into of an agreement in the legal sense of that term, for the obtaining of the property in question. *A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest is entered or not, the obligation to repay the owner is the same.*" Benedict vs. U. S., 271 Fed. at p. 719.

"An importer had put into his invoice the price actually paid for goods, with charges, and proposed to enter them at the values thus fixed. The collector concluded that the value would be ascertained as of the time of shipment in New York which was considerably higher. The importer protested but in order to avoid the penalty which was threatened, he did make an addition to his invoice so as to escape that penalty. In an action to recover back the excess duties, the court held: 'This

addition and its consequent payment of the higher duties were *so far from voluntary* in him that he accompanied them with remonstrances against thus being coerced to do the act in order to escape a greater evil and accompanied the payment with a protest against the legality of the course pursued towards him.' Now it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be done by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment." Maxwell vs. Griswold, 10 Howard, 243.

"Where the United States instituted an action for the recovery of money on a bond given with sureties, by a purser of the Navy and the defendants, in substance, pleaded that the bond was variant from that prescribed by law, and was under color of office, extorted from the obligor contrary to the statute, by the then Secretary of the Navy, as the condition of the purser's remaining in office and receiving its emoluments, and the United States demurred to this plea, it was held that the plea constituted a good bar to the action." U. S. vs. Tingey, 5 Peters, 115.

"Where the Internal Revenue Bureau requires a commission (on the sale of stamps) to be received in stamps instead of money and refused to modify its decision, receipts and settlements made in pursuance of that requirement and necessity

were not voluntary in such sense as to preclude the claimant from subsequently insisting on his statutory rights and recovering such commissions. . . ."

"The *parties* were *not* on *equal terms*. The *appellant had no choice*. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required." Swift vs. U. S., 111 U. S. 22.

"The payment of money to an official to avoid an onerous penalty, though the imposition of that penalty might have been illegal was sufficient to make the payment an involuntary one. . . . When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. When the duress has been exerted by one clothed with official authority or exercising a public employment, less evidence of compulsion or pressure is required." Robertson vs. Frank, 132 U. S., 17.

7. THE GOVERNMENT IS LIABLE FOR REFUSING TO RECEIVE AND PAY FOR WHAT IT HAS AGREED TO PURCHASE.

The allegations of the petition clearly show an agreement to purchase and a part compliance therewith and under the decision of this court in Gibbon vs. U. S. 8 Wall. 269, the government is required to pay for the entire shipment of wool, or to pay all damages for its failure to do so.

On all the facts alleged the petition is good and the demurrer should have been overruled.

Wherefore the appellant insists that the judgment of the Court of Claims be reversed, the demurer overruled and the suit remanded with costs.

Respectfully submitted,

RAYMOND M. HUDSON,
Attorney for the Appellant.